

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 20, 2002 Session

STATE OF TENNESSEE v. GARY WILLIAM BALES

Appeal from the Circuit Court for Blount County
No. C-10765 D. Kelly Thomas, Jr., Judge

No. E2001-00814-CCA-R3-CD
December 16, 2002

The defendant, indicted for second degree murder, was convicted by a jury of voluntary manslaughter and sentenced to six years in the Department of Correction. See Tenn. Code Ann. § 39-13-211. In this appeal as of right, the defendant challenges the length of his sentence, arguing that the trial court improperly applied two enhancement factors and failed to properly weigh one mitigating factor. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Joseph E. Costner and Amy E. Burroughs, Maryville, Tennessee, for the appellant, Gary William Bales.

Paul G. Summers, Attorney General & Reporter; Peter M. Coughlan, Assistant Attorney General; and Kirk E. Andrews and Edward P. Bailey, Jr., Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On August 11, 1997, the defendant struck the victim, Ray Brewer, on the head with a cinder block. Afterwards, the defendant telephoned 911 and reported to the dispatcher that he had injured the victim, who had repeatedly made sexual comments about a 14-year-old female acquaintance. When the authorities arrived, the victim, whose skull was partially crushed, was still alive but appeared to be choking on blood. Later, he died. When questioned, the defendant admitted the altercation, explaining that he was offended by the victim's comments about the female acquaintance. The defendant acknowledged that he struck the victim first, but claimed self-defense because the victim was acting in a threatening manner.

Dr. Robert Sadoff testified that the defendant suffered from a diminished mental capacity characterized by both schizophrenia, including auditory and visual delusions and hallucinations, and post-traumatic stress disorder. The defendant, who had been forcibly institutionalized in 1995, reported to Dr. Sadoff that he was sexually abused by a babysitter when he was approximately five or six years old. Dr. Sadoff also recalled that when the defendant was sixteen or seventeen years old, he was assaulted and sodomized by four men. According to Dr. Sadoff, the defendant insisted that the men pushed a wire in one of his ears and out the other and left a drill bit in his rectum that he believed was still there. Dr. Diana McCoy described the defendant as mildly mentally retarded and schizophrenic. It was also her opinion that the defendant suffered from post-traumatic stress disorder as a result of the rapes.

In rebuttal, the state offered the testimony of Dr. Rokeya Farooque, who evaluated the defendant at the Middle Tennessee Mental Health Institute. According to Dr. Farooque, the defendant had a history of substance abuse. She believed that a diagnosis of post-traumatic stress disorder was erroneous because the defendant did not exhibit all of the clinical symptoms. It was her opinion that the defendant, who reported neither flashbacks nor the hearing of voices at the time of his attack upon the victim, was not in a disassociative state at the time of the offense. Samuel Craddock, a psychologist at the Tennessee Mental Health Institute, testified that the defendant indeed suffered from schizophrenia, but was nevertheless able to recognize the wrongfulness of his actions.

The jury convicted the defendant of voluntary manslaughter. After a hearing, the trial court found two enhancement factors to be applicable: (1) that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (4) that the victim of the offense was particularly vulnerable because of age or physical or mental disability. See Tenn. Code Ann. § 40-35-114(1), (4). In mitigation, the trial court considered the defendant's "mental disease," see 40-35-113(8), but determined that it did not justify a downward adjustment of the defendant's sentence, which was set at the Range I maximum of six years. See Tenn. Code Ann. §§ 39-13-211(b) (classifying voluntary manslaughter as a Class C felony), 40-35-112(a)(3) (setting a Range I Class C felony sentence at three to six years).

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel

relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

Initially, the defendant contests the application of enhancement factor (1), that he has a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1). He argues that the trial court erroneously considered charges of attempted escape and assault for which no evidence was introduced at either trial or sentencing. The state contends that because the record is inadequate for review, the trial court's application of the enhancement factor was presumptively correct. The state also asserts that the defendant's prior use of illegal drugs supports application of the factor.

In determining the applicability of enhancement factor (1), a trial court must look to "not only the defendant's prior conviction record . . . but also any other criminal misconduct, regardless of whether it resulted in arrest, indictment, or conviction." State v. Massey, 757 S.W.2d 350, 352 (Tenn. 1988). Such criminal misconduct must be shown by a preponderance of the evidence. State v. Carico, 968 S.W.2d 280, 287 (Tenn. 1998). "An arrest or charge is not considered evidence of the commission of a crime. A trial court should not use evidence merely showing arrests, without more, to enhance a sentence." State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993) (emphasis added) (citations omitted); see also State v. Buckmeir, 902 S.W.2d 418, 424 (Tenn. Crim. App. 1995) (holding that trial court erroneously applied enhancement factor (1) where there was "no evidence in the record that the[] charges against the defendant were anything more than charges").

In this case, the presentence report indicates that at the time of sentencing, four counts of aggravated assault were pending against the defendant in Davidson County. The charges arose while the defendant was at a Department of Correction special needs facility. The report includes no further information. Other information in the record indicates that the incident involved an attempted escape and an assault on facility staff. In applying enhancement factor (1), the trial judge ruled as follows:

I think I am to consider the [d]efendant as he sits before me today, regarding criminal history and criminal behavior, which means that things that happened after this event can be considered. And that includes the – some type of assaultive and violent

behavior against an inmate here in the jail and personnel at the hospital in Middle Tennessee that – I'm not going [to] recount all that proof because that was subject to hearings that we had during the course of the trial and ruling on the evidentiary hearings. The grade of criminal behavior, I don't know. But from the facts that I heard, it certainly was, in my opinion, as it relates to this sentencing.

The other is – and I weighed that very heavily. Because those are violent acts. And we are here today sentencing for a very violent act.

(Emphasis added.)

In our view, those comments establish that the trial court did not rely solely on the existence of the assault charges against the defendant to support the application of enhancement factor (1). The record suggests that the trial court considered the facts and circumstances underlying the charges and determined that they constituted prior criminal behavior on the part of the defendant. Although the state did not present such evidence at the sentencing hearing, it had been introduced during the course of other hearings which occurred either before the trial or before the imposition of sentence. The trial judge declined to recite the details of the evidence and defense counsel made no objection or request for clarification. The other hearings were neither recorded nor transcribed and, as such, are not part of the record. The defendant chose not to file a statement of the evidence. See Tenn. R. App. P. 24(c).

When critical portions of the record are omitted, this court must presume that the decision of the trial court was correct. State v. Keen, 996 S.W.2d 842 (Tenn. Crim. App. 1999); State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Because it is the duty of the appellant to supply an adequate record for a determination on the merits, we cannot, under these circumstances, ascribe error to the trial court. See Tenn. R. App. P. 24; State v. Coolidge, 915 S.W.2d 820, 826 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Troutman, 979 S.W.2d 271 (Tenn.1998). Furthermore, other factors in the record are sufficient to support the application of enhancement factor (1). The presentence report reflects that the defendant was convicted for underage drinking in 1996. He admitted previous use of illegal drugs, including extensive use of marijuana. In our view, enhancement factor (1) was properly applied.

Next, the defendant contends that the trial court erred by applying enhancement factor (4), that the victim of the offense was particularly vulnerable because of age or physical or mental disability. See Tenn. Code Ann. § 40-35-114(1). He argues that the state failed to prove any particular vulnerability on the part of the victim or that the victim was unable to resist as a result thereof. The state maintains that the evidence of the victim's mental disability was sufficient, but it concedes that the record does not support a finding that it caused the victim to be particularly vulnerable to the defendant's attack.

The state bears the burden of proving that a victim is particularly vulnerable. State v. Poole, 945 S.W.2d 93 (Tenn. 1997); State v. Adams, 864 S.W.2d 31 (Tenn. 1993). In State v. Hayes, 899

S.W.2d 175, 185 (Tenn. Crim. App. 1995), this court ruled that evidence that the victim was unable to resist, unable to summon help, or unable to testify against the perpetrator, would indicate particular vulnerability. Findings of fact made in the trial court are conclusive on this court unless the evidence preponderates otherwise. Graves v. State, 512 S.W.2d 603, 604 (Tenn. Crim. App. 1973).

At the sentencing hearing, the victim's sister-in-law, Brenda Brewer, testified as follows regarding the victim's mental status:

[The victim] was in an automobile accident when he was just a young boy, about fifteen years old. And it mentally . . . done something to him. Because he was in a coma for six months, . . . And he was . . . like a child. I mean, he was a grown man, but he was . . . still like a child in so many ways.

Ms. Brewer also stated that the victim was unable to keep a job because of his "mind." She acknowledged that she had not known the victim prior to the automobile accident.

In applying enhancement factor (4), the trial court made the following findings:

Also, the mental condition of the victim, I did consider that. From the proof, he is a man that has been disabled because of . . . the mental impact of a serious wreck. He's been disabled all of his life. And was described by a family member as having more of a childlike mentality, which would impact his ability to appreciate what was going on and react like a normal person would under the circumstances.

In our view, the record does not support the application of the enhancement factor. That the victim was "like a child in so many ways" provides little, if any, insight into the victim's degree of vulnerability and falls short of establishing the existence of a mental disability. Moreover, there is no evidence to suggest that the victim's mental status would have rendered him unable to resist, unable to summon help, or unable to testify against the defendant. The application of enhancement factor (4) was erroneous.

In this appeal, the state urges this court to apply enhancement factor (9), that the defendant possessed or employed a deadly weapon during the commission of the offense. See Tenn. Code Ann. § 40-35-114(9). This court may apply an enhancement factor not found by the trial court if it is appropriate for the offense and established in the record. State v. Winfield, 23 S.W.3d 279, 283-84 (Tenn. 2000). Here, the trial court found that a deadly weapon was used during the commission of the offense, but it declined to apply the enhancement factor because it was an element of the offense. Use of a deadly weapon is not, however, an element of the offense of voluntary manslaughter. See Tenn. Code Ann. § 39-13-211(a); State v. Shaun Michael Fleegle, No. E2000-02045-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Jan. 22, 2002). Thus, enhancement factor (9) is applicable and therefore entitled to some weight. Several photographs appearing in the record reveal that the damage inflicted upon the victim was considerable.

Finally, the defendant argues that the trial court erroneously failed to give sufficient weight to his diminished mental capacity as a mitigating factor. See Tenn. Code Ann. § 40-35-113(8) (“[t]he defendant was suffering from a mental . . . condition that significantly reduced the defendant’s culpability for the offense”). In applying the factor, the trial court observed as follows:

In mitigation, I did consider [the defendant’s] mental disease. I think that was considered very heavily by the [j]ury in deciding whether or not he was guilty of second degree murder . . . I did not weigh that very heavily as it relates to voluntary manslaughter, because of the facts of this case. And I think that that’s already been given quite a bit of weight. And I’m not meaning to intimate that that wasn’t justified. That’s what happened and I think that has already been considered, as well. But I did consider it here because his mental condition would [a]ffect what would provoke him as opposed to what would provoke another person, . . . so I did consider that slightly, but not enough to reduce the sentence down below the six years.

As long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record, the weight given each enhancement and mitigating factor is discretionary. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Kelley, 34 S.W.3d 471, 479 (Tenn. Crim. App. 2000). That the jury convicted the defendant of the lesser included offense of voluntary manslaughter rather than second degree murder suggests that the jury considered the defendant’s diminished mental capacity. That the trial court chose not to further mitigate the gravity of the crime by imposing a lesser sentence based solely upon that factor was not erroneous.

In summary, the trial court properly found and weighted enhancement factor (1), that the defendant has a prior history of criminal convictions or behavior. Enhancement factor (4), that the victim was particularly vulnerable, should not have been applied. Enhancement factor (9), that the defendant employed a deadly weapon, is appropriate and is entitled to considerable weight. Mitigating factor (8), that the defendant was suffering from a culpability-reducing mental condition, is applicable, but was afforded little weight by the trial court.

Voluntary manslaughter is a Class C felony bearing a sentence of three to six years for Range I offenders. See Tenn. Code Ann. §§ 39-13-211(b), 40-35-112(a)(3). The two applicable enhancement factors, both entitled to great weight, justify a three-year increase above the presumptive minimum to the six-year maximum. It was not erroneous for the trial court to recognize the diminished capacity of the defendant as a mitigating factor without a corresponding reduction in sentence. Although the trial court misapplied an enhancement factor, the sentence was appropriate.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE